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**Before the
Federal Communications Commission
Washington, D.C. 20554**

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Implementation of Section 309(j))	MM Docket No. 97-234
of the Communications Act)	
-- Competitive Bidding for Commercial)	
Broadcast and Instructional Television Fixed)	
Service Licenses)	
)	
Reexamination of the Policy)	GC Docket No. 92-52
Statement on Comparative)	
Broadcast Hearings)	
)	
Proposals to Reform the Commission's)	GEN Docket No. 90-264
Comparative Hearing Process to)	
Expedite the Resolution of Cases)	

COMMENTS OF BEACON BROADCASTING, INC.

Beacon Broadcasting, Inc., licensee of noncommercial educational FM broadcast station WJCS, Allentown, Pennsylvania, through counsel, hereby offers these comments on the FCC's *Notice of Proposed Rulemaking*, FCC 97-397, released November 26, 1997 (the "*NPRM*"), concerning the implementation of competitive bidding for initial licenses for certain types of broadcast stations as mandated by the Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251 (1997).

These comments specifically address the FCC's proposal (*NPRM*, ¶ 50) to "treat non-profit applicants for commercial frequencies, including those who could qualify under 47 C.F.R. § 73.503 as a non-profit educational organization, no differently under the proposed filing and competitive bidding procedures than any other mutually exclusive applicant for commercial frequencies." the

reach of this proposal extends beyond the authority granted by Congress in the Balanced Budget Act and threatens the long-term viability of many noncommercial educational FM licensees.

The FCC's authority to implement a system of competitive bidding for initial broadcast licenses is found in new Section 309(j) of the Communications Act. Section 309(j)(2)(C) specifically exempts "stations described in section 397(6) of this title" from the FCC's general authority to use competitive bidding. That section defines the term "noncommercial educational broadcast station" to mean

[A] television or radio broadcast station which . . . under the rules and regulations of the Commission . . . is eligible to be licensed by the Commission as a noncommercial educational radio or television broadcast station and which is owned and operated by a public agency or nonprofit private foundation, corporation or association . . .

47 U.S.C. § 397(6).

Not only did the Balanced Budget Act amendments to the Communications Act specifically exempt noncommercial educational broadcast stations from the FCC's competitive bidding authority, Congress also specifically preserved the FCC's authority to award noncommercial educational broadcast station licenses through a system of random selection. 47 U.S.C. § 309(i)(5)(B).

While the *NPRM* does not suggest that competitive bidding will be used with respect to mutually exclusive applications in the reserved portion of the FM band (*e.g.*, *NPRM*, ¶¶ 60-61), it also glosses over the fact that qualified noncommercial educational applicants have long been able to apply for construction permits, and received noncommercial educational licenses, in the *unreserved* portion of the band. Of at least equal significance, the *NPRM* makes no attempt to square Section 309(j)(2)(c) with its proposal to subject noncommercial educational applicants in the unreserved portion of the band to the proposed competitive bidding procedures.

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It would be particularly harmful to noncommercial educational broadcasters if the FCC were to ignore Congress's clear demarcation of the FCC's competitive bidding authority between commercial and noncommercial applicants in order to impose a competitive bidding requirement on applications for construction permits for new FM translators.¹ For many noncommercial educational FM broadcast licensees, the ability to operate translators in the unreserved portion of the FM band is especially important. For reasons that are peculiar to the reserved portion of the band, many noncommercial educational stations operate with very low power. This is because, in the reserved portion of the band, stations are not assigned on the basis of a Table of Allotments but on a "demand" basis, providing the new station protects other stations from interference within their authorized service areas. This has caused the reserved portion of the band to become extremely congested. In addition, new stations in the reserved portion of the band must not cause interference to reception of TV Channel 6 stations, which often requires lower operating power, lower antenna heights or directional antennas, or a combination of such measures. For noncommercial educational FM stations seeking to provide "fill-in" service within their 1.0 mV/m contours, or to extend their service to nearby communities, the ability to construct a translator in the unreserved portion of the band is, for many, an essential safety valve that enables them to overcome terrain obstacles or meet the needs of nearby communities for a noncommercial educational FM service.

¹ It is far from clear that Section 309(j) grants the FCC competitive bidding authority for FM translators of any type. FM translators are not referred to in the statute, and the legislative history refers only to "applications for secondary broadcast services such as low power television, television translators and television booster stations." H.R. Conf. Rep. No. 105-217 (1st Sess.) (1997) at 1266. This portion of the legislative history can be fairly read to limit the FCC's authority to the specifically enumerated "secondary" broadcast services and to not bring FM translator stations within the ambit of Section 309(j).

If the FCC were to attempt to stretch its authority beyond that clearly provided by the Act, by requiring noncommercial educational applicants to participate in competitive bidding, few if any would have the resources to bid successfully for new FM translator licenses. Many would be forever prevented from providing reliable service to areas and populations with their theoretical 60 dBu contours or to residents of nearby communities that have expressed a need for their service.

Because the 1997 amendments to the Act do not specifically address either FM translators or pitting noncommercial educational applicants against commercial applicants, and in fact incorporate a broad exemption from competitive bidding for noncommercial educational applicants, it is well within the FCC's discretion, as the expert agency charged by Congress with interpreting and implementing the statute, to decide that, for sound policy reasons, noncommercial educational applicants should not be required to bid against each other, or against commercial applicants, for FM translator frequencies.²

For one reason, the FCC has a system for resolving mutually-exclusive translator applications (Section 74.1233(d) through (g)) that works efficiently and is not subject to the arbitrariness and inconsistent application that led to the abandonment of the FCC's comparative criteria for full power broadcast stations. *See* 47 U.S.C. § 309(j)(6)(E) (competitive bidding system does not relieve FCC of the "obligation . . . to continue to use engineering solutions, negotiation, threshold qualifications, service regulations and other means . . . to avoid mutual exclusivity in application and licensing proceedings"). For another reason, although FM translator applications may be mutually-exclusive, it is, in fact, rare for there to be mutually-exclusive applications to serve the same community. Thus,

² *E.g., Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-845 (1984).

subjecting such applications to competitive bidding would frustrate the FCC's obligations under Section 307(b) of the Act, to fairly and equitably allocate licenses among the various states and communities. That obligation has been preserved in the 1997 amendments to the Communications Act (Section 309(j)(6)(B)). Section 309(j)(4)(C)(i), moreover, directs the FCC, in its competitive bidding regulations, to "promote . . . an equitable distribution of licenses and services among geographic areas."

In exempting noncommercial educational FM applicants from competitive bidding for translator licenses, the FCC should not be concerned with a potential loss of significant revenue to the Federal government. For one reason, because the present regulations (Section 74.1232(d)) prohibit commercial FM licensees from constructing or operating translators except for "fill-in" service within their authorized protected contours, most FM translator applications, even in the unreserved portion of the band, seek to rebroadcast noncommercial educational FM stations. Thus, there are relatively few prospective commercial translator applicants with the resources to bid substantial sums for FM translator licenses. (For most noncommercial educational applicants, however, *any* sum is substantial and, likely, prohibitive.) Second, because of the secondary nature of the FM translator service, few parties will be willing to expend substantial dollars for a license for a station which can be summarily ordered off the air if unexpected interference to a full-power station occurs. *See, e.g., Forus FM Broadcasting of New York, Inc.*, 7 FCC Rcd 7880, ¶ 17 (Chief, Audio Serv. Div. 1992).

For the foregoing reasons, the FCC, in its final rules implementing competitive bidding to resolve mutually exclusive applications, should exempt noncommercial educational FM applicants, particularly applicants for noncommercial educational FM translator stations, in the unreserved

portion of the band from the competitive bidding procedures and, instead, rely on other means provided in the statute and the FCC's present rules to resolve such situations.

Respectfully submitted,

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